A **MURALITHARAN NARAISAMY & ANOR**

v.

AHMAD NOWAWI SAAD

B HIGH COURT MALAYA, ALOR SETAR
HO MOOI CHING JC
[CIVIL APPEAL NO: 12-53-2008]
28 FEBRUARY 2010

C ***ROAD TRAFFIC:*** *Negligence - Collision between motorcycle and motorcar - Motorcycle collided into rear of car - Circumstances leading to collision - Whether defendant driver abruptly stopped car resulting in collision - Whether defendant liable - Trial judge's finding of no liability - Whether correct - Whether appeal allowed*

D ***DAMAGES:*** *Personal injuries - Quantum - Closed fracture of the distal end of left radius/ulna styloid - Fracture of right radius - Loss of earnings - Living expenses - Assessment on quantum by trial judge - Whether correct - Whether appeal allowed*

E The plaintiffs claimed for damages for personal injuries against the defendant as a result of a collision between the plaintiffs' motorcycle and the defendant's car. It was the plaintiffs' case that the defendant had overtaken their motorcycle and then abruptly stopped in front of them giving the 1st plaintiff, who was riding the F motorcycle, no opportunity to avoid the collision. The defence case was that the defendant's car had come to a stop behind a row of cars when the plaintiffs' motorcycle suddenly collided into its rear when it was stationary. The sessions court judge dismissed the plaintiffs' claim with costs and made a provisional assessment on G quantum. The plaintiffs now appealed.

Held (dismissing the appeal against liability):

(1) There was no doubt that the front of the motorcycle had collided into the rear of the car as the damage to the car was H at its rear whilst the damage to the motorcycle was at its front. The dispute was only as to the circumstances leading to the collision. (para 2)

(2) The 1st plaintiff in his examination-in-chief testified that he was I riding at a speed of 60 kph when the defendant's car overtook him from the right and suddenly stopped about two cars' length in front of him without signal. He had braked and swerved but

failed to avoid the collision and sustained injuries as a result of the collision. His police report supported that version of the accident. However, in cross-examination the 1st plaintiff occasionally wavered and said that when he first saw the car it was stationary in front of him. The sessions judge was therefore not wrong in considering his oral evidence in totality and accepting the 1st plaintiff's submission that the defendant's car was stationary when the 1st plaintiff first saw the car. (para 3)

(3) On the issue that the defendant did not state in his police report that he had stopped due to a jam unlike his version given in court, he did nevertheless state that he had stopped as the road was busy with a row of vehicles. While he did not state in his police report that the other cars ahead of him had come to a stop, the impression given was that he had stopped because of road congestion. There was nothing to suggest that he came to a sudden stop after overtaking the plaintiffs. His evidence was supported by the evidence of his wife in that although she had no knowledge of whether there was a motorcycle behind them, she confirmed that the road ahead was busy and that the defendant had not come to a sudden stop but was stationary at the time of the collision. (para 4)

(4) There was nothing contradictory in para. 3 of the statement of defence as opposed to para. (f) of the particulars of negligence when in the former, the defendant said that he had stopped the car whilst in the latter he claimed to have slowed down. The defendant would definitely have had to slow down before coming to a stop. That did not mean that he was not stationary at the time of the collision. Further, it could not be accepted that a party was confined to pleading the particulars of negligence, matters of which he had personal knowledge only. The particulars could properly contain particulars of negligence drawn from inferences. (para 5)

(5) On the issue that an adverse inference should be drawn against the defence for failure to call the defendant's mother who was a passenger in the car, the mere failure to call a witness should not willy-nilly result in an adverse inference being drawn against the defence. (para 5)

(6) The sessions judge was entitled to accept the defence version based on the evidence adduced after careful analysis. He was not wrong in finding that the 1st plaintiff's speed of 60 kph was excessive in the circumstances as not only did the defendant

A and his wife claim that the road was busy, the investigating officer had confirmed it as well. Further, the sessions judge was not wrong in taking into consideration that there were no brake marks. Vehicles undoubtedly do not leave brake marks every time a driver brakes. In the present case, the defendant's car
B had allegedly overtaken a motorcycle going at 60 kph and then came to a total stop two car lengths away from the motorcycle. It was not probable that such a manoeuvre would require the use of emergency brakes that might leave brake marks. (para 6)

C **(7)** There was no misdirection on the part of the sessions judge and it was open to him to come to the conclusions he did based on the evidence adduced. There was sufficient judicial appreciation of the evidence and therefore, there was no reason to disturb his finding on liability. (para 6)

D **(8)** The quantum, had the appeal against liability been allowed, would be as follows: closed fracture of the distal end of the left radius/ulna styloid: RM18,000; fracture of the right radius: RM10,000; loss of earnings for one year allowed but no
E deduction should be made on the RM300 per month the 1st plaintiff received as pocket money from his employer who was also his father; living expenses: RM30 per day based on 26 working days totalling RM780 per month on the authority of *Chang Chong Foo & Anor v. Shivanathan Perumal*. (paras 8-11)

F **Case(s) referred to:**

Abdul Mokhti Haji Ahmad v. Idris Ibrahim [1976] 1 LNS 1 HC ***(refd)***

Batumalee Masilamani & Anor v. Thong Chan Leng & Anor [2003] 4 CLJ 95 HC ***(refd)***

Chang Chong Foo & Anor v. Shivanathan Perumal [1992] 4 CLJ 1939; [1992] 1 CLJ (Rep) 27 SC ***(refd)***
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Davies v. Powell Duffryn Associated Collieries Ltd [1942] AC 601 ***(refd)***

Harris v. Empress Motors Ltd and Cole v. Crown Poultry Packers Ltd [1983] 3 All ER 561 ***(refd)***

Jamiah Holam v. Koon Yin [1982] 1 LNS 89 HC ***(refd)***

Lau Swee Hua & 2 Ors v. Ajeng Wan & Anor [2007] 1 PIR [57] ***(refd)***
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Mahmood Kailan v. Goh Seng Choon & Anor [1976] 1 LNS 68 FC ***(refd)***

Mohd Salleh Mohd Arshad & 4 Ors v. Abdul Latip Kadir [2008] 2 PIR [21] ***(refd)***

Nicholas Arthur Nock v. Mohamed Ali Suleiman & Anor [1975] 1 LNS 113 HC ***(refd)***

I *Teoh Chu Thong v. Anantha Kiruisan PSR & Anor [2008] 2 CLJ 603 CA* ***(refd)***

Tey Chan v. South East Asia Insurance Bhd [1991] 1 LNS 86 HC ***(refd)***

For the appellant - M/s Brijnandan Singh Bhar & Co
For the respondent - M/s Bala Mahesan & Khairudin

Reported by Usha Thiagarajah

JUDGMENT

Ho Mooi Ching JC:

[1] It is common ground that at about 2.30pm on 30 June 2002 the 1st plaintiff (SP2) riding motorcycle KBB 1277 with the 2nd plaintiff riding pillion was involved in a collision with motorcar NAQ 3444 driven by the defendant (SD1). Both vehicles were travelling in the same direction ie, from Jenan towards Tanah Merah. The plaintiffs' case was that the defendant had overtaken their motorcycle and then stopped suddenly in front of them giving the 1st plaintiff no opportunity to avoid the collision. The defence case was that the defendant's car had come to a stop behind a row of cars when the plaintiffs' motorcycle suddenly collided into its rear when it was stationary. The Sessions Court dismissed the plaintiffs' claim with costs and made a provisional assessment on quantum. On appeal to this court, I dismissed the appeal against liability. The appellant plaintiffs now appeal against this court's decision on both liability and quantum.

[2] The scene of the accident was in the town of Tanah Merah. According to the investigating officer (PW1) the speed limit was 90 kilometres per hour and there were road-widening works on both sides of the road. When he arrived at the scene an hour after the accident, the road was very busy ('cukup sibuk'). He prepared a sketch plan P1 (p. 30 of the appeal record). The damage to the car was at its rear ie, its rear bumper and boot were dented; while its rear nearside light and its rear number plate were broken. As for the motorcycle, its front fork was bent inwards, the front mudguard broken, its handle bent, the nearside wing mirror broken and the front light broken. Six photographs of the scene and the damage to the vehicles were produced as P2 (A-F). There was no doubt that the front of the motorcycle had collided into the rear of the car. Only the circumstances leading to the collision were in dispute.

[3] SP2 testified during examination-in-chief that he was riding at a speed of 60 kph when SD1's car overtook him from the right, then stopped suddenly about two car lengths in front of him without giving any signal. He braked and swerved but failed to avoid the collision. He sustained injuries as a result of the collision and was warded for two days in hospital. His report P5 (p. 29 of the appeal record) lodged on 3 July 2002 supports this version of the accident. However, at times under cross-examination, he wavered and said that when he first saw the car it was stationary in front of him. It is the submission of learned counsel for the appellants that the plaintiff's version in his police report, his pleadings and his evidence in court are all consistent. That is ignoring his evidence in cross-examination. The learned trial judge was certainly not wrong in considering his oral evidence in totality and accepting SP2's admission that he first saw SD1's car when it was stationary in front of him.

[4] SD1's version is that when he arrived in front of a shop selling exhausts, he stopped his car as there was a jam ahead. Suddenly, he heard a bang from the rear of his car and saw a pillion rider being thrown in front of his car. He alighted and saw a motorcycle and its rider behind his car. He lodged his police report P10 (p. 28 of the appeal record) about 2 1/2 hours after the accident. In his police report, he said, "saya memberhentikan motorkar saya kerana semasa itu di hadapan saya sedang sibuk dengan deretan kenderaan". Learned counsel for the appellant complained that he did not say in the report that he had stopped because there was a jam. With respect, I think he is splitting hairs. He did say that he stopped because the road was busy with a row of vehicles. In the cases referred to eg, *Nicholas Arthur Nock v. Mohamed Ali bin Suleiman & Anor* [1975] 1 LNS 113 and *Abdul Mokhti bin Haji Ahmad v. Idris bin Ibrahim* [1976] 1 LNS 1, material facts were omitted from the police reports. I do not think they are authority for the proposition that police reports must be drafted with the precision that, perhaps, pleadings need to be. While he did not say in his report that the other cars ahead of him had come to a stop, the impression given is certainly that he had stopped because of road congestion. There is nothing to suggest that he came to a sudden stop after overtaking the plaintiffs although he seemed uncertain whether he had seen the motorcycle before he heard the bang. The evidence of SD1's wife (SD2) supports his evidence in that although she had no knowledge of whether there was a

motorcycle behind them, she confirmed that the road ahead was busy and DW1 had not come to a sudden stop but was stationary at the time of the collision. A

[5] Learned counsel for the appellants also complained that para. 3 of the statement of defence contradicted para. (f) of the particulars of negligence in that the former said that DW1 had stopped while the latter states that SP2 'gagal menumpukan perhatian terhadap motorkar defendan di hadapan yang memperlahankan motorkarnya kerana kesesakan lalu lintas'. I accept the submission of learned defence counsel that there is no contradiction as DW1 would certainly have had to slow down before coming to a stop. It does not mean that he was not stationary at the time of the collision. Further, I am unable to accept the submission that a party is confined to pleading in the particulars of negligence, matters of which he had personal knowledge only. I think, as submitted by the defence, that the particulars can properly contain particulars of negligence drawn from inferences. Another issue raised was that the court should have invoked an adverse inference against the defence for failure to call SD1's mother who was a passenger. The mere failure to call a witness should not willy-nilly result in an adverse inference being drawn against the defence. The presence of the mother was not mentioned in SD1's police report and the investigating officer admitted not knowing whether there were passengers in the car. If his mother were expected to give evidence adverse to him, it would certainly have served his interests better if SD1 had not mentioned her at all. B C D E F

[6] The learned trial judge had given grounds to support his decision. He was entitled to accept the defence version based on the evidence after a careful analysis of the evidence. He was not wrong in finding that SP2's speed of 60 kph was excessive in the circumstances as not only had SD1 and SD2 said that the road was busy, SP1 confirmed this. Although there were no 2 lanes demarcated between A2 and A3 in the sketch plan P1 (p. 30 of the appeal record), photograph P2C and P2D shows that the road was wide enough to accommodate two rows of traffic; and DW1's testimony that he was in the inner lane was not refuted. These photographs also tend to confirm that the scene of the accident was a busy one. The learned trial judge was not wrong in taking into consideration that as confirmed by SP1 there were no brake marks. Undoubtedly, vehicles do not leave brake marks every time a driver G H I

brakes, but here we are dealing with a car that had allegedly overtaken a motorcycle going at 60 kph and then come to a total stop two car lengths away from the motorcycle. It is not improbable that such a manoeuvre would require the use of emergency brakes that may leave brake marks. I find that there is no misdirection on the part of the learned trial judge and it was open to him to come to the conclusions he did based on the evidence. There was sufficient judicial appreciation of the evidence and thus, no reason for me to disturb his finding on liability (see *Teoh Chu Thong v. Anantha Kiruisan PSR & Anor* [2008] 2 CLJ 603).

Quantum

[7] Had I allowed the appeal against liability, I would have dealt with quantum as follows. It is recognised that as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. Before interfering, the appellate court should be satisfied that trial judge has acted on a wrong principle of law, or had misapprehended the facts, or had for other reasons made a wholly erroneous estimate of the damages suffered. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency (see *Mahmood bin Kailan v. Goh Seng Choon & Anor* [1976] 1 LNS 68 following *Davies v. Powell Duffryn Associated Collieries Ltd* [1942] AC 601; *Jamiah bt Holam v. Koon Yin* [1982] 1 LNS 89).

[8] Closed fracture of the distal end of the left radius/ulna styloid: The trial court assessed the sum of RM18,000 as general damages for this injury and associated disabilities. Learned counsel for the appellants submitted in the High Court that the award should be in the region of RM30,000 although it had been submitted in the lower court that RM20,000 would be a fair and reasonable award (see p. 69 of the record of appeal). It is totally unreasonable to inflate the sum on appeal without explanation. Although the learned trial judge did state 'hanya terdapat sedikit kecederaan', the sum assessed being RM2,000 short of what learned counsel for the plaintiff submitted as reasonable before him, certainly does not go down heavily on the ground of insufficiency.

[9] Fracture of the right radius: RM10,000 was assessed for this injury with the trial court relying on *Batumalee Masilamani & Anor v. Thong Chan Leng & Anor* [2003] 4 CLJ 95, a High Court decision. It was submitted that a reasonable award is RM20,000. Reference was made to *Mohd Salleh bin Mohd Arshad & 4 Ors v. Abdul Latip bin Kadir* [2008] 2 PIR [21]. That report is short on detail, merely referring to an award of RM33,0000 for a 'closed fracture of the right distal radius, laceration wound over the right hand and soft tissue injury of the back'. Similarly, in *Lau Swee Hua & 2 Ors v. Ajeng Wan & Anor* [2007] 1 PIR [57], the sum of RM20,000 was given for a fracture of the right radius and neck of the right radius, effectively two fractures. Both these cases are decisions of the Sessions Court and the reports are silent on the residual disabilities suffered. The trial court was not wrong in law or fact by relying on *Batumalee*'s case, where the injury and the disabilities are comparable to those in the instant case. The disabilities of PW2 are by no means trivial, all the more so when the right hand is his dominant hand. There, despite reference being made to decisions of the lower courts where much higher awards were made for similar injuries, the High Court only increased the award from RM6,000 to RM8,000. The trial court assessed a sum of RM10,000 after allowing for inflation due to the passage of time. *Batumalee*'s case was decided some five years before the instant case. It matters not that had I been sitting as trial judge, I may have given a higher award. The fact remains that the sum assessed is not manifestly inadequate.

A B C D E F

Living Expenses

[10] In his evidence, SP2 said that he was unable to work for one year as a result of his accident. He was a foreman working for his father (SP4) at RM1,700 per month and after the accident, SP4 gave him pocket money of RM300 per month. It was said that SP2 was unable to work because he was unable to carry heavy weights. He still remains unable to do so. It was submitted before the trial court that loss of earnings should be awarded for one year or some reasonable period but the trial court allowed loss of earnings for one year despite the lack of medical evidence to support this claim in full. Nevertheless, SP2 still complains that there should not have been a deduction of RM300 a month from the loss of earnings nor should there have been a deduction of RM900 per month for living expenses. SP2's employer is also his father and as it was undisputed

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A that the sum of RM300 was given as pocket money, I would agree that his loss of earnings should not have been reduced by this sum. SP2 said he spent RM50 per day although no details were given. In *Chang Chong Foo & Anor v. Shivanathan Perumal* [1992] 4 CLJ 1939; [1992] 1 CLJ (Rep) 27, the Supreme Court referred, *inter alia*, to
B *Harris v. Empress Motors Ltd. and Cole v. Crown Poultry Packers Ltd* [1983] 3 All ER 561, where the Court of Appeal held that:

> (ii) the sum to be deducted as living expenses is the proportion of the deceased's net earnings that he would have spent exclusively on himself to maintain himself at the standard of
C life appropriate to his situation; ...

However, the court only deducted as living expenses in that case, the expenses incurred on petrol to go to work and meals while at work (see also *Tey Chan v. South East Asia Insurance Bhd* [1991] 1
D LNS 86).

[11] The trial court deducted living expenses amounting to RM30 per day or RM900 per month. For want of evidence, it is not unreasonable for the trial court to deduct the sum of RM30 per day
E out of the RM50 he spent. However, following *Chang Chong Foo*'s case, RM30 per day should only have been deducted for 26 working days, totalling RM780.

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